IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1628 OF 2007
IN
SUIT NO.2429 OF 1997

Naina D. Kamani ... Plaintiff

Vs.

M/s. Janson Engineering & Trading Pvt. Ltd. & Ors. ... Defendants

And

Pushpa T. Kadambande ... Applicant

And

The Court Receiver, High Court, Bombay. ... Respondent

Mr. J.S. Chandnani i/b M/s. Lexim Associates for the applicant.

Ms. Sheetalkumar with Mr. M.M. Patel i/b M.M. Patel & Co. for the plaintiff.

Mr. Rajesh Patil i/b Mahesh Jani & Co. for defendant 6.

CORAM : SMT. RANJANA DESAI, J.

DATE ON WHICH THE JUDGMENT RESERVED : 4TH OCTOBER, 2007.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 26TH OCTOBER, 2007.

JUDGMENT:-

1. In this notice of motion, the applicant's basic prayers are as under :

> *"(b) that the suit as filed by plaintiff is liable to be dismissed and applicant prays for dismissal thereof, inasmuch as :-*
>
> *(i) though applicant is a necessary party she being in occupation / possession / enjoyment of Flat o.31, sitaute on ground floor of Ram Niwas building, Pochkhanwala Road, Worli, Mumbai – 400 018, subject matter of aforementioned Suit as a tenant thereof, along with defendant No.7, as disclosed in affidavit in support hereof, yet, she is not impleaded as a party defendant for a long span of seven years, obviously for oblique motive of snatching the orders against applicants behind her back though not warranted on facts or in law;*
>
> *(ii) the filing of aforementioned suit is masterminded on the basis of fabricated / concocted facts / circumstances and documents, as shown in affidavit in support hereof, with oblique motive of snatching the orders from this Hon'ble Court, which plaintiff could not obtain either on facts or in law, which constitutes*

offence under Section 192 of the Indian Penal Code;

(iii) thus the suit as filed is a collusive suit and plaintiff has not approached this Hon'ble Court with clean hands;

(c) That the Receiver High Court appointed by this Hon'ble Court vide Order dated 7th Feb. 2000 in Notice of Motion No.2438 of 1997 in aforementioned Suit o.2429 of 1997 be discharged in view of the reasons set out in the affidavit enclosed herewith and all the orders so far passed by the Court Receiver be set aside / recalled."

2. The central issue in this motion is the applicant's claim to tenancy in respect of Flat No.31 situate on the ground floor of Ram Nivas building, Pochkhanwala Road, Worli, Mumbai (for convenience, "the said flat"), along with defendant 7 and the alleged fraud played by the plaintiff. It is necessary to narrate certain facts to understand the background of the present litigation.

3. Plaintiff Naina Kamani has filed the present suit, inter alia, for a declaration that defendant 7 is a trespasser in the said flat; for an order directing defendant 7 to hand over possession of the said flat

to defendant 1-company; for an order and declaration that no valid meeting of the directors of defendant 1 was held on 5/8/1993 and the alleged minutes of the said meeting are false and for a direction that they may be cancelled and for a declaration that defendants 6 and 7 have no right, title and interest in the said flat.

4. The plaintiff claims to be a permanent director and shareholder of defendant 1. The plaintiff' scase is that she owns 7500 equity shares of Rs.100/- each fully paid up of defendant 1-company, which is a private limited company. Defendant 2, a Non Resident Indian is a shareholder of defendant 1. Defendant 4 is an alternate director in place and stead of defendant 2. Defendant 3 is a permanent director of defendant 1. Defendant 5 claims to be an alternate director of defendant 2 and is an employee of M/s. Ragoson Trading Pvt. Limited and/or of defendant 6. Defendant 6 is the father of defendant 2. Defendant 7 was at all material times, a domestic servant of the applicant herein, who was occupying the ground floor of the building “Ram Nivas”. Defendant 7 is alleged to be the trespasser in the said flat. It is not necessary to refer to the

rest of the defendants for the disposal of this notice of motion.

5. In short, it is the case of the plaintiff that defendants 2, 3 and 4 in collusion with defendants 5 and 6 have been committing consciously and deliberately, illegal and fraudulent acts which are jeopardizing the interest of defendant 1 and its shareholders particularly, the plaintiff.

6. According to the plaintiff, in 1988, defendant 1 purchased Ram Nivas building in which the said flat is situated, in a court auction. At that time, as per the list of occupants, it was found that the ground floor was occupied by the applicant unauthorisedly. Defendant 7 worked as the applicant's domestic servant. Defendant 6 claims to be a tenant of the said flat in pursuance of a Board meeting dated 5/8/1993. Defendant 6 has admitted that the said flat is not in his possession. According to the plaintiff, defendant 7 who has no semblance of any right or interest in the said flat is in possession thereof and is a rank trespasser. According to the plaintiff, defendants 2, 3, 4, 5 and 6 are trying to

usurp the said flat and, in the event the said flat is lost to defendant 1, defendant 1 would suffer heavy loss. It is, inter alia, on these allegations that the present suit is filed.

7. I have heard Mr. Chandnani, learned counsel appearing for the applicant at considerable length. The case of the applicant as evident from the affidavit in support of the notice of motion and as narrated by Mr. Chandnani is that the applicant's deceased husband was a tenant of the original landlord in 1955-1956. The applicant is residing in the said flat since her marriage in 1975. According to the applicant, defendant 7 was a personal servant of her deceased husband and was staying in the said flat along with the deceased. He was treated by the couple as their son. According to the applicant, she is paying rent to defendant 1. Applicant has relied upon several documents in support of her claim that she is paying rent. They are annexed to the affidavit. I have carefully perused them.

8. It is the case of the applicant that the plaintiff and defendant 1

and other directors of defendant 1 with oblique motive of ousting her and defendant 7, concocted and fabricated documents. It is contended that defendant 2 has fabricated letter dated 31/12/1993 and 13/1/1994 showing that she had surrendered tenancy in respect of the said flat in favour of defendant 6. Several letters have been annexed to the affidavit in support of the applicant's claim that steps were taken by the plaintiff, defendant 1 and defendant 6 to concoct various other documents. It is alleged that to complete the concoction, defendant 6 sent letter dated 1/4/1994 to defendant 1 enclosing a cheque towards the rent of said flat from January to March, 1994. According to the applicant the fact that she is in possession of the said flat is evident from letter dated 30/7/1994 (Ex-M) sent by the plaintiff to Navinkumar Jatia and Indrakumar Pugalia seeking meeting of the Board of Directors for considering and initiating proceedings for evicting the applicant. It is contended that inspite of this, the plaintiff filed the present suit.

9. My attention is drawn to order dated 7/2/2000 passed by Justice D.K. Deshmukh appointing the Court Receiver, High Court,

Bombay, as Receiver in respect of the said flat. It is pointed out that Justice D.K. Deshmukh has made it clear that appointment of Court Receiver will not come in the way of the original tenant from prosecuting proceedings which she might have launched or may launch in future. My attention is also invited to order dated 21/6/2000 passed by the Division Bench of this court, whereby the applicant's appeal challenging the above order was dismissed protecting her rights as she was not party to the notice of motion. The Division Bench has observed that the appeal was filed by a party who is an intervenor but was not before the learned Single Judge. It is pertinent to note that the Division Bench has clearly noted that the applicant is neither a necessary party nor a proper party.

10. It appears that the applicant then filed a suit in the Small Causes Court at Bombay claiming tenancy. Order of the Supreme Court dated 29/7/2002 passed in the Special Leave Petition filed by the applicant against order dated 21/6/2000 passed by the Division Bench of this court is also on record. The Supreme Court has

dismissed the special leave petition by observing that the applicant's suit be decided on its own merits. My attention is also drawn to the order dated 26/7/2000 whereby the permission was granted to the applicant to sue the Court Receiver, High Court, Bombay, by filing a suit in the Small Causes Court at Bombay. The applicant then took out Interim Notice No.3361 of 2000 in R.A.D. Suit No.1250 of 2000 for injunction, which was rejected. The applicant carried an appeal from the said order to the Division Bench of the Small Causes Court at Bombay. The Division Bench of the Small Causes Court by order dated 28/8/2002 restrained defendant 1 herein i.e. M/s. Logoson Trading Co. Pvt. Ltd. and the Court Receiver from disturbing and/or taking possession of the said flat from the applicant. Mr. Chandnani pointed out that the Small Causes Court has held that the applicant was in possession of the said flat. It is also pointed out that the writ petition filed against the said order was dismissed by this court by observing that it was filed against an interlocutory order. Defendant 6 preferred appeal against that order seeking direction that he may be accepted as agent of the Court Receiver. The Division Bench by its order dated

21/6/2000 rejected his prayer as he was not in possession of the said flat. These facts are narrated because Mr. Chandnani tried to draw support from them. For the reasons which I shall soon state, in my opinion, the applicant cannot draw any support from them in the present motion.

11. It is pertinent to note that in the affidavit in support of the present notice of motion, it is averred that defendant 7 had taken out Notice of Motion No.696 of 2007 for dismissal of the said suit on the ground of fraud and fabrication of documents but the learned Single Judge of this court rejected the motion on the ground that defendant 7 has no locus and, hence, the applicant is compelled to take out the present notice of motion. Mr. Chandnani submitted written submissions reiterating all the above facts and laying stress on various orders passed by this court. Reliance is placed by Mr. Chandnani on the judgments of the Supreme Court in ***Udit Narain Singh Malpaharia v. Additional Member of Board of Revenue, Bihar, AIR 1963 SC 786; Raghunath & Ors. v. Kedarnath, AIR 1969 SC 1316; Samar Singh v. Kedar Nath***

& Ors. AIR 1987 SC 1926; Mansukhlal Dhanraj Jain & Ors. v. Eknath Vithal Ogale, AIR 1995 SC 1102; Anthony C. Leo v. Nandlal Bal Krishnan, AIR 1997 SC 173; United India Insurance Co. Ltd. v. Rajendra Singh, AIR 2000 SC 1165 and M/s. Chitivalasa Jute Mills v. M/s. Jaypee Rewa Cement AIR 2004 SC 1687. He also placed reliance on the judgments of this court in ***S.S. Mhatre & Ors. v. State of Maharashtra & Ors. 2005(3) Bom.C.R. 501 and Madhukar Venkatesh Ullal v. Anita Hermy D'Souza & Ors., 2006 (2) Bom.C.R. 241*** and the judgment of the Gauhati High Court in ***Chuba Temsu Ao & Ors. v. Nangponger & Ors. AIR 1994 Gauhati 110***.

12. In my opinion, the present notice of motion must be rejected only on the ground that admittedly notice of motion making almost identical prayers and on same grounds of fraud and fabrication of documents taken out by defendant 7 being Notice of Motion No.696 of 2007 was rejected by Justice A.M. Khanwilkar on 28/3/2007. The case of the applicant is that defendant 7 is like her son. She claims to be a tenant of the said flat along with defendant

7. Affinity of applicant and defendant 7 is also clear from the fact that the same advocate is representing both of them. The main prayer in that motion was that the suit be dismissed because the applicant who is a necessary party is not made a party. In the affidavit in support, defendant 7 had, inter alia, alleged that order dated 7/2/2000 passed by Justice Deshmukh appointing Court Receiver and order dated 3/7/2000 passed by the Division Bench are obtained by the plaintiff/director of defendant 1 by practicing fraud on the court. On 28/3/2007, Notice of Motion No.696 of 2007 was disposed of by Justice A.M. Khanwilkar by passing the following order :

> *"1. This motion is ill-advised for more than one reason. In the first place, grievance that the order passed by this Court on 7th February, 2000 was on account of the fraud played by the plaintiff on this court, it does not command to me. In any case, this grievance cannot be heard at the instance of defendant no.7, who participated in the earlier proceedings.*
>
> *2. Be that as it may, the necessity of considering the claim of respondent no.2, who was not before the Court when earlier order was passed, was considered right upto the apex court. The respondent no.2 herself filed S.L.P. Before the apex*

court being S.L.P. (Civil) No.3967 of 2001 which as been disposed of by order dated 29th July, 2002. The argument that the order dated 7th February, 2000 be set aside on account of the fraud played by the plaintiff by non disclosure of the interest of the respondent No.2, therefore will have to be stated to be rejected.

3. I see no propriety for entertaining this motion at the instance of the defendant no.7.

4. All questions on merits on the maintainability of the suit will be decided at the appropriate stage.

5. It is made clear that if any further application is moved at the instance of the defendant no.7, on such unstatable plea in future, the Court may consider of imposing exemplary costs as may be warranted at the relevant time."

Therefore, the allegation of fraud was rejected by this court. This Court observed that if any further application is moved at the instance of defendant 7, it may consider imposing exemplary costs.

13. Defendant 7 carried an appeal before the Division Bench of this court. By a speaking order dated 18/4/2007, the Division Bench rejected the said appeal. I may quote the relevant observations of the Division Bench.

"5. Plain reading of the above quoted paragraphs would disclose that the learned Single Judge while disposing of the notice of motion no.2438 of 1997 and 4321 of 1994 taking into consideration the stand taken by the original tenant that she had left the premises in the hands of Kanojia completely and had gone to stay at 10, South Harsidhi, Opp. Urdu School, Indore, had held that it being nobody's case that any sub-tenancy was created in favour of Kanojia prior to 1972 and no independent right in the suit flat having been claimed by Kanojia, the Notice of Motion for appointment of Court Receiver and direction to the Court Receiver to take physical possession of the flat was justified and was accordingly granted. Apparently, we find that on consideration of the facts established from the records obviously discloses total absence of any fraud having been played upon the court by the plaintiff. Once the facts which were considered and recorded in the order are not in dispute, but merely the conclusions drawn based on those facts are sought to be disputed, it cannot lead to conclusion that there was any fraud being played by the party. The aggrieved party in such case may have right of appeal against such order. However, by no stretch of imagination, it can be said that there was any fraud being placed by the party. The entire Notice of Motion having been moved solely on the allegation of fraud having been played by the plaintiff in obtaining the said order as the appellant Kanojia failed to prove the same and on that count having been dismissed, there is absolutely no substance in the appeal. In fact, the appeal is absolutely waste of time of the court and, therefore, deserves to be dismissed with exemplary cost of Rs.25,000/-. The costs shall be paid within four weeks by the

> *appellant and on deposit thereof, to be credited to the account of the Maharashtra Legal Aid Services Authority.*
>
> *6. Appeal accordingly stands summarily dismissed."*

14. Thus, the Division Bench negatived the contention that any fraud was played by the plaintiff. The appeal was described as waste of time of the court. Exemplary costs of Rs.25,000/- were imposed on defendant 7.

15. The applicant has filed the present notice of motion for the same relief and making the same allegations. As I have already stated, the applicant and defendant 7 are represented by the same advocate. The applicant treats defendant 7 as her son. The applicant and defendant 7 claim to be tenants of the said flat. Clearly, therefore, because defendant 7 could not get the relief, the applicant has preferred this notice of motion. In fact, this is admitted in the affidavit in support of the motion. The court of coordinate jurisdiction has rejected the case that the plaintiff has

played any fraud and held that the suit cannot be dismissed on that ground. While dismissing the appeal filed by the applicant challenging the said order, the Division Bench has confirmed this finding. It is, therefore, not possible for this court to adjudicate upon that issue again and give any finding. It was improper for the applicant to raise the same contention. I deprecate this conduct of the applicant. Ideally, the applicant should be saddled with heavy costs. However, I refrain from doing so hoping that the applicant would desist from repeating such conduct in future. However, should the applicant persist in this kind of behaviour, she will have to be dealt with with a firm hand. Suffice it to observe that I concur with the view taken by this court that no fraud has been played by the plaintiff. No relief can be granted to the applicant in this notice of motion. Needless to say that it is not open to Mr. Chandnani to canvass the same submissions again by placing reliance on several judgments. Such an exercise cannot be undertaken by the applicant in view of the findings recorded by this court in the orders to which I have made reference hereinabove.

16. In the circumstances, the motion is rejected. The Court Receiver shall take such steps as are necessary in the circumstances of the case.

[SMT. RANJANA DESAI, J.]

At this stage, Mr. Chandnani, learned counsel for the applicant prays that this order be stayed. The prayer made by learned counsel for the applicant is rejected.

[SMT. RANJANA DESAI, J.]